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PP

MAHKAMAH TINGGI MALAYA, KUALA LUMPUR B
KAMARDIN HASHIM H
[PERMOHONAN JENAYAH NO: 44-130-11-2013]
11 APRIL 2014

UNDANG-UNDANG PERLEMBAGAAN: *Hak-hak asasi - Kebebasan bercakap dan bersuara - Perlembagaan Persekutuan, Perkara 10(1)(a) - Larangan terhadap penayangan filem yang belum diluluskan oleh Lembaga Penapisan Filem - Sama ada ss. 6(1)(b) dan 6(2)(a) Akta Penapisan Filem 2002 melanggari Perkara 10(1)(a) Perlembagaan Persekutuan - Pembatasan terhadap hak keistimewaan untuk bersuara dan berekspresi - Sama ada munasabah dan berkadaran* C D

UNDANG-UNDANG PERLEMBAGAAN: *Pentafsiran - Prinsip pentafsiran - Peruntukan hak-hak keistimewaan ditafsirkan secara meluas dan liberal - Pembatasan hak-hak keistimewaan ditafsirkan secara sempit* E

UNDANG-UNDANG PERLEMBAGAAN: *Undang-undang - Keesahan undang-undang yang dipersoalkan - Sama ada ss. 6(1)(b) dan 6(2)(a) Akta Penapisan Filem 2002 tidak berperlembagaan - Prinsip keabsahan undang-undang - Ujian bagi menentukan sama ada sesuatu peruntukkan statut bercanggah dengan Perlembagaan - Perbandingan kepentingan awam dengan kepentingan individu - Sama ada terdapat alasan bagi memutuskan bahawa ss. 6(1)(b) dan 6(2)(a) adalah tidak berpelembagaan* F

Pemohon telah dihadapkan dengan satu pertuduhan di Mahkamah Majistret bagi kesalahan di bawah Akta Penapisan Filem 2002 ("APF"). Pemohon dituduh telah menayangkan sebuah filem bertajuk "No Fire Zone: The Killing Fields of Sri Lanka" yang belum diluluskan oleh Lembaga Penapisan Filem ("LPF"), satu kesalahan di bawah s. 6(1)(b) APF. Sebelum perbicaraan dijalankan, pemohon telah memfailkan permohonan ini untuk mendapatkan satu pengisytiharan bahawa ss. 6(1)(b) dan 6(2)(a) adalah tidak konsisten dengan fasal-fasal 8 dan 10 Perlembagaan Persekutuan ('perlembagaan') dan justeru itu adalah tidak sah menurut peruntukan fasal 4(1) Perlembagaan. Pemohon juga G H I

memohon agar pendakwaan jenayah terhadapnya diketepikan atau dibatalkan. Pemohon menghujahkan bahawa: (i) s. 6(1)(b) dibaca bersama s. 6(2)(a) APF adalah tidak munasabah kerana ia adalah suatu larangan yang menyekat hak kebebasan pemohon untuk bersuara dan berekspresi di bawah per. 10 Perlembagaan; (ii) s. 6(1)(b) dibaca bersama s. 6(2)(a) APF adalah tidak berkadaran dengan tujuan APF dan keterlaluan kerana ia bersifat sekatan terdahulu tanpa apa-apa rujukan kepada alasan-alasan hubungan baik dengan negara-negara lain, ketenteraman awam atau prinsip moral dan sekatan-sekatan yang bertujuan untuk melindungi keistimewaan Parlimen atau mana-mana Dewan Undangan atau untuk membuat peruntukan menentang penghinaan mahkamah, fitnah atau pengapian apa-apa kesalahan; (iii) s. 6(1)(b) dibaca bersama s. 6(2)(a) APF bukan merupakan sekatan tetapi satu halangan mutlak berkenaan hak kebebasan bersuara dan ekspresinya; dan (iv) hak kebebasan bersuara dan ekspresi adalah suatu hak yang dijamin di bawah per. 10 Perlembagaan dan sekatan melalui kesalahan jenayah yang boleh dihukum penjara dan/atau denda tidak boleh dikenakan hanya kerana tidak mendapat kelulusan di bawah APF.

Diputuskan (menolak permohonan pemohon):

(1) Dalam menafikan hak-hak keistimewaan di bawah per. 10(1)(a) Perlembagaan hendaklah ditafsirkan secara meluas dan liberal. Manakala peruntukan yang melibatkan pembatasan hak keistimewaan itu hendaklah ditafsirkan secara sempit; *Lee Kwan Woh v. PP* (dirujuk). (para 13)

(2) Terdapat juga prinsip mengenai keabsahan undang-undang dari pandangan perlembagaan. Di bawah prinsip ini terdapat satu anggapan yang kuat bahawa setiap undang-undang yang telah melalui proses badan legislatif dan diluluskan oleh Parlimen adalah sah dari segi perundangan; *PP v. Su Liang Yu* (dirujuk). (para 24)

(3) Ujian bagi menentukan sama ada sesuatu peruntukan statut itu bercanggah dengan Perlembagaan atau tidak adalah hanya dengan merujuk kepada Perlembagaan itu sendiri. Apa-apa norma lain yang tidak bertulis dan tidak termaktub dalam Perlembagaan tidak wajar dirujuk atau diberikan sebarang perhatian atau penekanan. Ujian juga patut dipakai mengenai

sama ada peruntukan yang ingin dibatalkan tersebut adakah sememangnya langsung tidak boleh dipertahankan. Sekiranya peruntukan-peruntukan tersebut boleh dipertahankan, maka Mahkamah tidak seharusnya membatalkan peruntukan-peruntukan tersebut. (para 29)

(4) Kebenaran untuk membatalkan sesuatu peruntukan undang-undang hanya telah dibenarkan dalam hal-hal keadaan yang berikut: (i) bahawa terdapat peruntukan yang tersurat dalam Perlembagaan yang memperuntukkan hak yang telah dilanggari oleh peruntukan undang-undang yang ingin dicabar; (ii) bahawa peruntukan undang-undang yang ingin dicabar itu jelas bercanggah dengan Perlembagaan sama ada dari segi bahasa mahupun dari segi perlaksanaan dan/atau pemakaiannya; (iii) percanggahan dalam peruntukan undang-undang yang ingin dicabar itu tidak boleh dibaca dan/atau ditafsir secara harmoni dengan Perlembagaan sama ada secara tersurat atau tersirat; dan (iv) percanggahan tersebut tidak boleh diselesaikan melainkan dengan pembatalan salah satu dari peruntukan undang-undang atau Perlembagaan, dan berdasarkan kepada prinsip keunggulan Perlembagaan seperti terkandung dalam per. 4(1) Perlembagaan, Perlembagaan hendaklah mengatasi peruntukan undang-undang bertulis yang lain. (para 30)

(5) Dalam mentafsirkan sesuatu peruntukan undang-undang dalam konteks perlembagaan, mahkamah perlu menilai kepentingan awam diberikan keutamaan jika dibandingkan dengan kepentingan individu; *Yong Moi Sin v. Kerajaan Malaysia & Anor* (dirujuk). (para 31)

(6) Peruntukan APF yang membuat pembatasan secara *blanket* turut melibatkan filem-filem dokumentari dan juga kartun dikatakan sebagai tidak munasabah dan tidak berkadaran. Prosedur yang diperuntukkan di bawah s. 6(1)(b) APF adalah munasabah dan berkadaran dengan tujuan dan matlamat APF itu diwujudkan. Pembatasan yang diadakan adalah wajar bagi mencapai maksud asal APF itu digubal. (para 40)

(7) Seksyen 6(1)(b) dan 6(2)(a) APF adalah pembatasan terhadap hak keistimewaan untuk bersuara dan berekspresi yang munasabah dan berkadaran dengan tujuan dan matlamat yang ingin dicapai oleh APF. Pembatasan tersebut tidak bercanggah atau *ultra vires* di bawah per. 10(2)(a) Perlembagaan. Maka, peruntukan-peruntukan tersebut tidak wajar dibatalkan di bawah per. 4(1) Perlembagaan. (para 42)

Kes-kes yang dirujuk:

Ah Thian v. Government of Malaysia [1976] 1 LNS 3 FC ***(dirujuk)***

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(dirujuk)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(dirujuk)***

Datuk Haji Harun Haji Idris v. PP [1976] 1 LNS 19 FC ***(dirujuk)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (1) [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(dirujuk)***

Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19 CA ***(dirujuk)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(dirujuk)***

Ooi Kean Thong & Anor v. PP [2006] 2 CLJ 701 FC ***(dirujuk)***

PP v. Cheah Beng Poh, Louis & Ors & Anor [1984] 1 CLJ 117; [1984] 2 CLJ (Rep) 383 HC ***(dirujuk)***

PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(dirujuk)***

PP v. Pung Chen Choon [1994] 1 LNS 208 SC ***(dirujuk)***

PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(dirujuk)***

PP v. Su Liang Yu [1976] 1 LNS 113 HC ***(dirujuk)***

Re Mulundika & Ors v. The People [1996] 2 LRC 175 ***(dirujuk)***

Re Munhumeso [1994] 1 LRC 282 ***(dirujuk)***

Re New Patriotic Party v. Inspector-General of Police [2001] AHRLR 138 ***(dirujuk)***

Romesh Thappar v. The State of Madras [1950] 2 SCR 594 ***(dirujuk)***

Said Mir Bahrami v. Pengarah Penjara Sungai Buloh, Selangor [2013] 5 CLJ 447 FC ***(dirujuk)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(dirujuk)***

Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(dirujuk)***

Yong Moi Sin v. Kerajaan Malaysia & Anor [1999] 8 CLJ 651 HC ***(dirujuk)***

Perundangan yang dirujuk:

Federal Constitution, arts. 4(1), 5, 8, 10(1)(a), (b), (2)(a), (3), (4), 13
Film Censorship Act 2002, ss. 4, 6(1)(b), (2)(a), 9, 10, 21, 25
Sarawak Land Code, ss. 5(3), (4)

Bagi pihak pemohon - Edmund Bon Tai Soon (New Sin Yew & Joshua Tay H'ng Foong bersamanya); T/n Cheng Weng Keng & Assocs
Bagi pihak pendakwaan - Jean Sharmila Jesudeson; TPR

Dilaporkan oleh Amutha Suppayah

PENGHAKIMAN

Kamardin Hashim H:

[1] Pemohon, Lena Rasathi A/P A Hendry telah dihadapkan dengan satu pertuduhan di Mahkamah Majistret Kuala Lumpur dalam kes no: 83-005-09-2013 bagi kesalahan di bawah Akta Penapisan Filem 2002 ("APF"). Pertuduhan terhadap pemohon dibaca seperti berikut:

> Bahawa kamu pada 3.7.2013 jam lebih kurang 9.00 malam di Kuala Lumpur dan Selangor Chinese Assembly Hall, Jln. Maharajalela, 50460 Kuala Lumpur, di dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur didapati menayangkan filem bertajuk "No Fire Zone: The Killing Fields of Sri Lanka" yang belum diluluskan oleh Lembaga dan dengan yang demikian kamu telah melakukan kesalahan di bawah seksyen 6(1)(b) Akta Penapisan Filem 2002 dan boleh dihukum di bawah seksyen 6(2)(a) Akta yang sama.

[2] Pemohon mengaku tidak bersalah terhadap pertuduhan yang dibacakan dan minta dibicarakan.

[3] Sebelum perbicaraan di Mahkamah Majistret dijalankan, pemohon telah memfailkan permohonan di mahkamah ini untuk mendapatkan perintah-perintah yang berikut:

(i) Satu pengistiharan bahawa ss. 6(1)(b) dan 6(2)(a) adalah tidak konsisten dengan Fasal-Fasal 8 dan 10 Perlembagaan Persekutuan dan justeru itu adalah tidak sah menurut peruntukan Fasal 4(1) Perlembagaan Persekutuan;

(ii) Bahawa pendakwaan jenayah terhadap pemohon di Mahkamah Majistret Kuala Lumpur kes jenayah no: 83-005-09-2013 diketepikan ("set aside") dan/atau dibatalkan ("quashed") dan/atau digantung selamanya ("permanently stayed");

(iii) Selanjutnya, bahawa mahkamah yang mulia ini memerintahkan agar pemohon dibebaskan dan dilepaskan;

(iv) Bahawa perbicaraan kes jenayah no: 83-005-09-2013 di Mahkamah Majistret Kuala Lumpur hendaklah digantung atau ditangguhkan sementara menunggu pelupusan pendengaran permohonan ini; dan

(v) Sebarang perintah-perintah dan/atau relif-relif yang selanjutnya yang difikirkan wajar dan suai-manfaat.

A **[4]** Secara ringkasnya, permohonan pemohon adalah untuk membatalkan pertuduhan yang beliau hadapi di Mahkamah Majistret melalui permohonan ini di bawah Fasal 4(1) Perlembagaan Persekutuan dan/atau di bawah bidang kuasa sedia ada mahkamah ini.

B

[5] Alasan-alasan bagi menyokong permohonan pemohon di sini dinyatakan di dalam affidavit sokongan yang telah diikrarkan oleh pemohon pada 25 November 2013 seperti di lampiran 3. Di perenggan 4, affidavit sokongan oleh pemohon tersebut, antara lain
C pemohon menyatakan seperti berikut:

> 4.1 Seksyen 6(1)(b) dibaca bersama seksyen 6(2)(a) Akta tersebut adalah tidak munasabah kerana ia adalah suatu larangan yang menyekat hak kebebasan Pemohon untuk bersuara dan ekspresi ("freedom of speech and expression")
D di bawah Fasal 10 Perlembagaan Persekutuan.
>
> 4.2 Seksyen 6(1)(b) dibaca bersama seksyen 6(2)(a) Akta tersebut adalah tidak bersekadar ("disproportionate") dengan tujuan Akta tersebut dan keterlaluan kerana ia bersifat sekatan terdahulu ("prior restraint") tanpa apa-apa rujukan
E kepada alasan-alasan hubungan baik dengan negara-negara lain, ketenteraman awam atau prinsip moral dan sekatan-sekatan yang bertujuan untuk melindungi keistimewaan Parlimen atau mana-mana Dewan Undangan atau untuk membuat peruntukan menentang penghinaan Mahkamah,
F fitnah atau pengapian apa-apa kesalahan.
>
> 4.3 Seksyen 6(1)(b) dibaca bersama seksyen 6(2)(a) Akta tersebut bukan merupakan sekatan tetapi satu halangan mutlak berkenaan hak kebebasan bersuara dan ekspresinya.
>
> 4.4 Hak kebebasan bersuara dan ekspresi adalah suatu hak yang
G dijamin di bawah Fasal 10 Perlembagaan Persekutuan dan sekatan melalui kesalahan jenayah yang boleh dihukum penjara dan/atau denda tidak boleh dikenakan terhadap saya hanya kerana saya tidak mendapat kelulusan di bawah Akta tersebut.

H

[6] Pemohon mendakwa bahawa s. 6(1)(b) dibaca bersama dengan s. 6(2)(a) APF adalah bercanggah dengan Fasal-fasal 8 dan 10 Perlembagaan Persekutuan dan adalah tidak sah serta hendaklah dibatalkan seperti menurut Fasal 4(1) Perlembagaan
I Persekutuan.

[7] Permohonan pemohon ditentang keras oleh pihak responden. Satu afidavit jawapan telah difailkan dan diikrarkan oleh Ooi Chean Ling pada 20 Disember 2013, seperti di lampiran 5. Deponen affidavit tersebut menegaskan bahawa pihak pendakwaan akan meneruskan dengan pertuduhan terhadap pemohon memandangkan terdapat bukti kukuh yang menunjukkan bahawa pemohon telah menayangkan filem "No Fire Zone: The Killing Fields of Sri Lanka" dengan tanpa terlebih dahulu mendapatkan kelulusan daripada Lembaga Penapisan Filem ("LPF") di bawah APF.

[8] Encik Edmund Bon Tai Soon, peguambela terpelajar bagi pemohon berhujah bahawa s. 6(1)(b) dibaca bersama dengan s. 6(2)(a) APF adalah peruntukan-peruntukan yang mengenakan pembatasan yang mutlak dan tidak munasabah terhadap hak kebebasan untuk bersuara dan ekspresi yang dijamin di bawah Fasal 10(1)(a) Perlembagaan Persekutuan. Peguambela memberikan lima alasan mengapa beliau berhujah sedemikian. Alasan-alasan tersebut adalah:

(a) Peruntukan-peruntukan tersebut telah mengenakan sekatan terawal (prior restraint) terhadap hak kebebasan untuk bersuara dan ekspresi apabila menghendaki semua dan setiap filem mendapatkan kelulusan daripada LPF sebelum filem-filem tersebut boleh diedar dan ditayangkan;

(b) Peruntukan-peruntukan tersebut terjumlah kepada pembatasan secara mutlak terhadap hak kebebasan untuk bersuara dan ekspresi dan ini telah melebihi had pembatasan yang diperuntukkan di bawah Fasal 10(1)(b) Perlembagaan Persekutuan;

(c) Peruntukan-peruntukan tersebut juga tidak berkadaran (disproportionate) dan tidak berkaitan dengan tujuan yang ingin dicapai oleh APF serta membenarkan kuasa secara sewenang-wenang diberikan kepada LPF untuk menghalang secara otomatik filem-filem daripada ditayang atau diedarkan walaupun sesebuah filem itu tidak menggugat keselamatan negara, perhubungan antarabangsa atau ketenteraman awam mahupun moral masyarakat awam;

(d) Kesan langsung daripada peruntukan-peruntukan tersebut menyebabkan hak keistimewaan untuk bersuara dan ekspresi menjadi suatu yang ilusi dan tidak berkesan; dan

A (e) Adalah tidak berpelembagaan apabila perlaksanaan hak keistimewaan di bawah Perlembagaan Persekutuan menjadi satu jenayah sekiranya kelulusan LPF tidak diperolehi terlebih dahulu di dalam keadaan di mana tiada apa-apa kriteria yang dapat difahami sebagai mengancam keselamatan negara, B perhubungan antarabangsa, kententeraman awam ataupun moral masyarakat awam.

[9] Peguambela terpelajar seterusnya menghujahkan bahawa ujian yang patut digunapakai oleh mahkamah dalam menentukan C keesahan sesuatu peruntukan undang-undang adalah ujian kemunasabahan. Adakah adil dan munasabah semua dan setiap filem dihalang daripada diedar dan ditayangkan tanpa mendapat kelulusan terlebih dahulu daripada LPF. Peguambela secara sinis berhujah adakah filem-filem kartun dan animasi seperti "Hikayat D Sang Kancil" atau "The Little Mermaid" atau "The Lion King" juga tidak boleh ditayangkan jika tidak mendapat kelulusan LPF terlebih dahulu. Ini adalah tidak munasabah apabila filem-filem yang jelas tidak membawa sebarang ancaman kepada keselamatan negara, hubungan antarabangsa, ketenteraman awam dan moraliti E juga tertakluk kepada pemakaian ss. 6(1)(b) dan 6(2)(a) APF. Oleh itu peguambela terpelajar berhujah peruntukan-peruntukan tersebut hendaklah dibatalkan di bawah Fasal 4(1) Perlembagaan Persekutuan.

F **[10]** Peguambela terpelajar telah merujuk kepada nas-nas berikut untuk menyokong dan menguatkan hujahannya, iaitu: *Romesh Thappar v. The State of Madras* [1950] 2 SCR 594, yang telah diputuskan oleh Mahkamah Agong di India dan kes *PP v. Pung Chen Choon* [1994] 1 LNS 208; [1994] 1 MLJ 566. Dalam kes G *Romesh Thappar* (*supra*), telah diputuskan seperti berikut:

> Where a law purports to authorize the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible H to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of I speech and expression only in cases where danger to public

security is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent.

[11] Dalam kes *Pung Chen Choon* (*supra*), Mahkamah Agong setelah merujuk kes *Romesh Thappar* (*supra*), membuat keputusan seperti berikut:

Secondly, we endorse the proposition that, where a law purports to authorize restrictions in language wide enough to cover restrictions both within and without the permissible limits of legislative action, it cannot be upheld, not even so far as it is applied within the constitutional limits, for it is impossible to apply the principle of severability.

[12] Mengenai isu keabsahan sesuatu peruntukan undang-undang dan prinsip keperlembagaan, peguambela terpelajar telah merujuk kepada keputusan Mahkamah Agong dalam kes *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98; [1981] 1 MLJ 29, yang mana diputuskan seperti berikut:

First, judicial precedent plays a lesser part than is normal in matters or ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way - 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v. Fisher* [1973] 3 All ER 21). A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition and rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect of those fundamental rights and freedoms. It is in the light of this kind of ambulatory approach that we must construe our Constitution'.

[13] Dalam menafikan hak-hak keistimewaan di bawah Fasal 10(1)(a) Perlembagaan Persekutuan, peguambela terpelajar berhujah, hendaklah ditafsirkan secara meluas dan liberal. Manakala peruntukan yang melibatkan pembatasan hak keistimewaan itu hendaklah ditafsirkan secara sempit. Mahkamah ini bersetuju sangat dengan hujahan peguambela terpelajar tersebut. Dalam kes *Lee Kwan Woh v. PP* [2009] 5 CLJ 631, Mahkamah Persekutuan telah memutuskan seperti berikut:

> The courts of Hong Kong have adopted a similar approach when interpreting their Basic Law, in *Leung Kwok Hung v The Hong Kong Special Administrative Region* [2005] 887 HKCU I, Li CJ when delivering the unanimous judgment of the Court of Final Appeal said:
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> > It is well established in our jurisprudence that the courts must give such a fundamental right a generous interpretation so as to give individuals its full measure. *Ng Ka Ling v Director of Immigration* [1999] 2 HKCFAR 4 at 28-9. On the other hand, restrictions on such a fundamental right must be narrowly interpreted. *Gurung Kesh Bahadur v Director of Immigratio*n [2002] 5 HKCFAR 480 at para. 24. Plainly, the burden is on the Government to justify any restriction. This approach to constitutional review involving fundamental rights, which has been adopted by the Court, is consistent with that followed in many jurisdictions. Needless to say, in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them.
>
> We return home to end our citation of the authorities. In the recent case of *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 1 CLJ 521, this court in the judgment of Hashim Yusoff FCJ approved, *inter alia*, the following passage in the judgment of the Court of Appeal in *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19:
>
> > The long and short of it is that our Constitution - especially those articles in it that confer on our citizens the most cherished of human rights - must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become.

[14] Dalam kes *PP v. Cheah Beng Poh, Louis & Ors & Anor* [1984] 1 CLJ 117; [1984] 2 CLJ (Rep) 383, Hashim Yeop A Sani HMP yang bersidang sebagai hakim di Mahkamah Tinggi, telah membuat keputusan seperti berikut: A

> The Court as guardian of the rights and liberties enshrined in the constitution is always jealous of any attempt to tamper with rights and liberties. But the right in issue here i.e. the right to assemble peaceably without arms is not absolute for the Constitution allows Parliament to impose by law such restrictions as it deems necessary in the interest of security and public order. In my view, what the Court must ensure is only that any such restrictions may not amount to a total prohibition of the basic right so as to nullify or render meaningless the right guaranteed by the Constitution. B C

[15] Dalam kes *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261, Mahkamah Rayuan membuat keputusan seperti berikut: D

> When the constitutionality of State action; be it legislative (which is not the case here) or administrative; is called into question on the ground that it infringes a fundamental right, the test to be applied is, whether that action directly affects to fundamental rights guaranteed by the Federal Constitution, or that its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory. E

[16] Mengenai doktrin kekadaran, peguambela terpelajar telah merujuk kepada keputusan dalam kes *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19; [2006] 6 MLJ 213, di mana Mahkamah Rayuan telah membuat keputusan berikut: F G

> [8] The other aspect to interpreting our Constitution is this. When interpreting the other parts of the Constitution, the court must bear in mind the all pervading provision of art. 8(1). That article guarantees fairness of all forms of State action ... It must also bear in mind the principle of substantive proportionality that art. 8(1) imports ... In other words, not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved. This is sometimes referred to as 'the doctrine of rational nexus' ... A court is therefore entitled to strike down State action on the ground that it is disproportionate to the object sought to be achieved ... H I

A [9] Against the background of these principles it is my judgment that the restrictions which art. 10(2) empower Parliament to impose must be reasonable restrictions. In other words, the word 'reasonable' must be read into the sub-clauses of art. 10(1) ... We can read the word 'reasonable' before the word 'restriction' in art. 10(2)(c).

B

...

[11] There it is. The court must not permit restrictions upon the rights conferred by art. 10 that render those rights illusory. In other words, Parliament may only impose such restrictions as are reasonably necessary. To emphasise, only proportionate legislative response is permissible under art. 10(2)(c).

C

[17] Dan dalam kes *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, telah diputuskan oleh Mahkamah
D Persekutuan seperti berikut:

[5] The other principle of constitutional interpretation that is relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art. 10(2)(c). It says that 'Parliament may by
E law impose ... (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'. Now although the article says 'restrictions', the word 'reasonable' should be read into the
F provision to qualify the width of the proviso. The reasons for reading the derogation as 'such reasonable restrictions' appear in the judgment of the Court of Appeal in *Dr. Mohd Nasir bin Hashim v. Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19, which reasons are now adopted as part of this judgment. The contrary view expressed by the High Court in
G *Nordin bin Salleh & Anor v. Dewan Undangan Negeri Kelantan & Ors* [1992] 1 MLJ 343: [1992] 1 CLJ 463 is clearly an error and is hereby disapproved. The correct position is that when reliance is placed by the state to justify a statute under one or more of the provisions of art. 10(2) the question for determination is
H whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article.

[18] Seterusnya di para. 18, 19 dan 27 kes *Sivarasa* (*supra*), Mahkamah Persekutuan menyatakan seperti berikut:

I

[18] Following the majority decision of this court in *Badan Peguam Malaysia v. Kerajaan Malaysia*, the other provisions of the Constitution must be interpreted in keeping with the doctrine of

procedural and substantive fairness housed in art. 8(1). Thommen J in *Shri Sitaram Sugar Co Ltd v. Union of India & Ors* [1990] 3 SCC 223 at p. 251 explained the effect of art. 14 of the Indian Constitution which is the equipollent of our art. 8(1) as follows:

> Any arbitrary action, whether in the nature of a legislative or administrative or quasi-judicial exercise of power, is liable to attract the prohibition of art. 14 of the Constitution. As stated in *EP Royappa v. State of Tamil Nadu* [1974] 4 SCC3 'equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch'. Unguided and unrestricted power is affected by the vice of discrimination: *Maneka Gandhi v Union of India*. The principle of equality enshrined in art. 14 must guide every State action, whether it be legislative, executive, or quasi-judicial: *Ramana Dayarnam Shetty v. International Airport Authority of India* [1979] 3 SCC 489, 511-12, *Ajay Hasia v. Khalid Mujib Sehravardi* [1981] 1 SCC 722 and *DS Nakara v. Union of India* [1983] 1 SCC 305.

[19] Accordingly, when state action is challenged as violating a fundamental right, for example, the right to livelihood or the personal liberty to participate in the governance of the Malaysian Bar under art. 5(1), art. 8(1) will at once be engaged. When resolving the issue, the court should not limit itself within traditional and narrow doctrinaire limits. Instead it should, subject to the qualification that will be made in a moment, ask itself the question: is the state action alleged to violate a fundamental right procedurally and substantively fair. The violation of a fundamental right where it occurs in consequence of a fair procedure but should also in substance be fair, that is to say, it must meet the test of proportionality housed in the second, that is to say, the equal protection limb of art. 8(1).

[27] The next issue to consider is whether the section violates the equal protection clause. his calls for an interpretation of that clause. The test here is whether the legislative state action is disproportionate to the object it seeks to achieve. Parliament is entitled to make a classification in the legislation it passes. But the classification must be reasonable or permissible. To paraphrase in less elegant language the words of Mohamed Azmi SCJ in *Malaysian Bar v. Government of Malaysia* [1987] 2 MLJ 165, the classification must (i) be founded on an intelligible *differentia* distinguishing between persons that are grouped together from others who are left out of the group; and (ii) the *differentia* selected must have a rational relation to the object sought to be achieved by the law in question. And to quote that learned Judge:

A "What is necessary is that there must be a nexus between the basis of classification and the object of the law in question." In short, the state action must not be arbitrary. This, then, is the common thread that webs and binds the two limbs of art. 8(1). Hence the overlap.

B **[19]** Selain daripada nas-nas dari India dan dari dalam negara, peguambela terpelajar turut merujuk beberapa nas daripada negara-negara Komanwel. Nas-nas tersebut termasuklah nas-nas berikut:

(i) *Re Munhumeso* [1994] 1 LRC 282, yang diputuskan oleh
C Mahkamah Agong di Negara Zimbabwe;

(ii) *Re Mulundika & Ors v. The People* [1996] 2 LRC 175, yang diputuskan oleh Mahkamah Agong Zambia; dan

(iii) *Re New Patriotic Party v. Inspector-General of Police* [2001]
D AHRLR 138, keputusan Mahkamah Agong Ghana.

[20] TPR Jean Sharmila Jesudason yang mewakili pihak responden berhujah bahawa setiap hak keistimewaan yang diperuntukkan di bawah Fasal 10(1) Perlembagaan Persekutuan bukanlah hak yang
E mutlak. Hak-hak keistimewaan itu terbatas di bawah Fasal 10(2), 10(3) dan 10(4) Perlembagaan Persekutuan. TPR juga berhujah mahkamah ini hendaklah turut melihat kepada niat Parlimen dalam menggubal peruntukan-peruntukan tersebut serta tujuan yang ingin dicapai oleh APF. Undang-undang itu adalah perlu dan munasabah
F bagi menjaga keselamatan negara, kepentingan awam, perhubungan antarabangsa dan juga moraliti. Peruntukan-peruntukan yang terdapat dalam APF tidak berbentuk "blanket ban" memandangkan terdapat peruntukan mengenai "due process" dan juga rayuan terhadap keputusan LPF tersebut.

G **[21]** Fasal 4, Fasal 8 dan Fasal 10 Perlembagaan Persekutuan yang berkaitan dengan permohonan pemohon diperturunkan sepenuhnya seperti di bawah:

H 4.(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

(2) The validity of any law shall not be questioned on the
I ground that:

(a) it imposes restrictions on the right mentioned in Clause (2) of Article 9 but does not relate to the matters mentioned therein; or

(b) it imposes such restrictions as are mentioned in Clause (2) of Article 10 but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or:

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

8.(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.

A (4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

B (5) This Article does not invalidate or prohibit:

(a) any provision regulating personal law;

(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, C to persons professing that religion;

(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions D in the public service;

(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or E part, or for voting in such an election;

(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;

F (f) any provision restricting enlistment in the Malay Regiment to Malays.

10. (1) Subject to Clauses (2), (3) and (4):

(a) every citizen has the right to freedom of speech and G expression;

(b) all citizens have the right to assemble peaceably and without arms;

(c) all citizens have the right to form associations.

H (2) Parliament may by law impose:

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public I order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

(b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;

(c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.

(3) Restrictions on the right to form associations conferred by paragraph (c) of Clause (1) may also be imposed by any law relating to labour or education.

(4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under paragraph (a) of Clause (2), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

[22] Oleh kerana Perlembagaan Persekutuan adalah merupakan undang-undang tertinggi negara maka undang-undang bertulis yang lain, sekiranya bercanggah dengan Perlembagaan Persekutuan, terutamanya mencabuli hak-hak asasi dan kebebasan asasi yang termaktub dalam Perlembagaan Persekutuan, akan terbatal setakat mana percanggahan tersebut (lihat Per. 4(1) Perlembagaan). Prinsip ini telah diakui dan diterimapakai oleh Mahkamah Agong dalam kes *Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (1)* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72; [1992] 1 MLJ 697 dan diikuti oleh Mahkamah Rayuan dalam kes *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261 (lihat juga *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112 oleh Suffian LP).

[23] Dalam kes *Tan Tek Seng* (*supra*), Mahkamah Rayuan melalui Gopal Sri Ram HMR (ketika itu) telah memutuskan di ms. 286-287, seperti berikut:

> As I have earlier said, the expression 'law' which appears in arts. 5(1) and 8(1) of the Federal Constitution includes procedural law, and in particular, any procedure prescribed by written law. If a particular procedure prescribed by written law is found to be

A arbitrary or unfair or the procedure adopted in a given case is held to be unfair, then, generally speaking, it must be struck down as offending art. 5(1) read with art. 8(1).

The third observation I wish to make flows naturally from what I have said in the preceding paragraph. In the context of art. 5(1), B if an unfair procedure is resorted to in the deprivation of a person's life or liberty, then the decision and the procedure are liable to be struck down. For the purposes of the present discussion, it becomes important to ascertain the meaning of the expression 'life' appearing in art. 5(1). Little difficulty need be C encountered in this respect as there are a number of authorities in which the point has arisen for decision.

[24] Selain dari prinsip-prinsip tersebut di atas, terdapat juga prinsip mengenai keabsahan undang-undang dari pandangan perlembagaan (presumption of constitutionality of the law). Di D bawah prinsip ini terdapat satu anggapan yang kuat bahawa setiap undang-undang yang telah melalui proses badan legislatif dan diluluskan oleh Parlimen adalah sah dari segi perundangan. Dalam ke *PP v. Su Liang Yu* [1976] 1 LNS 113; [1976] 2 MLJ 128, Hashim Yeop A Sani H (ketika itu) telah memutuskan seperti E berikut:

Therefore whatever may be said of the United States and Indian Supreme Court decisions cited by both parties the following propositions still make good law:

F (1) When a law is challenged as infringing the Article, it is necessary for the court first of all to ascertain the policy and object of the statute concerned.

(2) Having ascertained the policy and object the court then if it is a special law examine whether there is reasonable G classification.

(3) The reasonableness of the classification should be tested with reference to the circumstances existing at the time of the enactment of the statute.

H (4) Procedural statutes are equally subject to the constitutional limitation as substantive laws unless the change in procedure is purely technical or formal.

(5) In the absence of a reasonable classification, substantial I departures from the ordinary law of procedure in a criminal trial would offend against the Article but not minor changes which do not really prejudice the accused. In order to find

out whether there has been a substantial departure from normal procedure, the test to be applied is not the degree of inequality, but the reality of it. There is no question of law being discriminatory unless it empowers the administrative authority, in its discretion, to impose a more onerous procedure than the ordinary one.

(6) A legislation which does not contain any provision which is directly discriminating may yet offend against the guarantee of equal protection if it confers upon the executive or administrative authority an unguided and uncontrolled discretionary power in the application of the law.

(7) There is always a presumption in favour of constitutionality of an enactment and the burden is upon him who attacks the enactment to show that there has been a clear transgression of the constitutional principles.

(8) It must be presumed that the legislature understands and correctly appreciates the need of its own people and that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds provided however that while good faith and knowledge of the existing conditions on the part of the legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of holding that there must be some undisclosed and unknown reasons for the discrimination.

(9) Whether a particular piece of legislation is discriminatory should be determined in each case as it arises and no general rule can safely down.

(10) Finally on the presumption of constitutionality a legislation is not to be struck down as discriminatory if any state facts may reasonably be conceived to justify it. In order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived as existing at the time of the legislation.

[25] Peguambela terpelajar dalam memajukan hujahannya turut berpegang kepada prinsip yang telah diputuskan dalam beberapa kes di negara-negara Komanwel yang lain terutama dari India, Zimbabwe, Zambia dan Ghana. Dengan hormatnya keputusan

dalam kes-kes yang dirujuk dari bidang kuasa negara luar selain dari negara kita, tidak mengikat mahkamah ini dalam apa cara jua sekali pun. Keputusan-keputusan dalam bidang kuasa negara-negara tersebut hanyalah berbentuk persuasif semata-mata.

[26] Dalam kes *PP v. Sihabduin Hj Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82; [1980] 2 MLJ 273, Mahkamah Persekutuan telah membuat keputusan bahawa sesuatu undang-undang yang digubal dan diluluskan oleh pihak penggubal undang-undang hendaklah ditafsirkan mengikut kehendak perundangan tersebut digubal. Kehendak perundangan tersebut hendaklah diberikan kuatkuasa undang-undang mengikut polisi dan tujuan undang-undang itu digubal. Oleh itu niat Parlimen dalam sesuatu undang-undang seperti termaktub di bawah sesuatu undang-undang adalah perlu dikaji selidik terlebih dahulu. Mahkamah Persekutuan menyatakan dengan tegas seperti berikut:

> Thirdly, if the law-maker so amends the law, to paraphrase the words of Lord Diplock at page 541 in *Duport Steels Ltd v. Sirs* [1980] 1 All ER 529, the role of the judiciary is confined to ascertaining from the words that the law-maker has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral; or to paraphrase the words of Lord Scarman at page 551 in the same case, in the field of statute law the judge must be obedient to the will of the law-maker as expressed in its enactments, the judge has power of choice where differing constructions are possible, but he must choose the construction which in his judgment best meets the legislative purpose of the enactment. Even if the result be unjust but inevitable, he must not deny the statute; unpalatable statute law may not be disregarded or rejected, simply because it is unpalatable; the judge's duty is to interpret and apply it.

[27] Keputusan Mahkamah Persekutuan tersebut menggambarkan sebahagian prinsip anggapan keabsahan sesuatu perundangan. Dalam kes *Ooi Kean Thong & Anor v. PP* [2006] 2 CLJ 701, Mahkamah Persekutuan telah memutuskan berikut:

> [16] In the area of public law and in particular administrative law, there are judicial pronouncements, local and foreign, which provide for the grounds to rely upon in relation to judicial control of subsidiary legislation. One such ground is whether the parent act

or the subsidiary legislation is constitutional or in conformity with the provisions of the Constitution. If it infringes the Constitution itself or any constitutional provision then it is struck down for that reason. But it has to be borne in mind that the courts have been consistently applying the presumption of constitutionality in favour of impugned statutory provision and to succeed the onus is therefore on the party asserting otherwise to show (see *Public Prosecutor v. Pung Chen Choon* [1949] 1 MLJ 566; *Public Prosecutor v. Su Liang Yu* [1976] 2 MLJ 128).

[28] Sesuatu peruntukkan undang-undang itu terbatal kerana bercanggah dengan Perlembagaan Persekutuan hanya dalam hal keadaan tertentu seperti diputuskan oleh Mahkamah Persekutuan dalam kes *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766. Dalam kes tersebut, permohonan dibuat untuk membatalkan ss. 5(3) dan 5(4) Kanun Tanah Sarawak yang kononnya bercanggah dengan Per. 5 dan Per. 13 Perlembagaan Persekutuan. YAA Raus Sharif HMP (sekarang PMR) telah mengikuti keputusan Mahkamah Persekutuan terdahulu dalam kes *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 dan memutuskan seperti berikut:

[180] On the issue whether this court should use "international norms" embodied in the UNDRIP to interpret arts. 5 and 13 of the Federal Constitution I have only this to say. International treaties do not form part of our law, unless those provisions have been incorporated into our law. We should not use international norms as a guide to interpret our Federal Constitution. Regarding the issue of determining the constitutionality of a statute, Abdul Hamid Mohamad PCA (as he then was) in *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 at p. 355 had this to say:

> So, in determining the constitutionality or otherwise of a statute under our constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah FJ (as his Royal Highness then was) quoting Frankfurter J said in *Looh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC) said: "The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it.

[181] I share the same view. Thus, I hold that the impugned sections do not violate art. 5 and 13 of the Federal Constitution. In coming to the above conclusion, I am always guided by the principle that when the court is faced with the issue of constitutionality of a provision of a statute, the court should be slow in striking down the impugned provision for being

unconstitutional. In this respect, I wish to repeat the words of Jeevan Reddy J in *State of Bihar @ Ors v. Bihar Distillery Ltd* AIR [1997] SC 1511, which as quoted by Gopal Sri Ram JCA (as he then was) in *Kerajaan Negeri Selangor & Ors v. Tagong Tasi & Ors* [2005] 4 CLJ 169 which reads:

> The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain.

[29] Jelas daripada nas-nas yang telah dirujuk oleh Mahkamah Persekutuan, ujian bagi menentukan sama ada sesuatu peruntukan statut itu bercanggah dengan Perlembagaan Persekutuan atau tidak adalah hanya dengan merujuk kepada Perlembagaan itu sendiri. Apa-apa norma lain yang tidak bertulis dan tidak termaktub di dalam Perlembagaan tidak wajar dirujuk atau diberikan sebarang perhatian atau penekanan. Ujian juga patut dipakai mengenai sama ada peruntukan yang ingin dibatalkan tersebut adakah sememangnya langsung tidak boleh dipertahankan. Sekiranya peruntukan-peruntukan tersebut boleh dipertahankan, maka mahkamah tidak seharusnya membatalkan peruntukan-peruntukan tersebut. Keputusan Mahkamah Persekutuan mengenai perkara ini adalah mengikat mahkamah ini dan saya akur dengannya.

[30] Berdasarkan kepada pembacaan kepada nas-nas yang dirujuk oleh pihak-pihak dalam permohonan pemohon di sini, kebenaran untuk membatalkan sesuatu peruntukan undang-undang hanya telah dibenarkan dalam hal-hal keadaan yang berikut:

(i) Bahawa terdapat peruntukan yang tersurat dalam Perlembagaan Persekutuan yang memperuntukkan hak yang telah dilanggari oleh peruntukan undang-undang yang ingin dicabar;

(ii) Bahawa peruntukan undang-undang yang ingin dicabar itu jelas bercanggah dengan Perlembagaan Persekutuan sama ada dari segi bahasa mahupun dari segi perlaksanaan dan/atau pemakaiannya;

(iii) Percanggahan dalam peruntukan undang-undang yang ingin dicabar itu tidak boleh dibaca dan/atau ditafsir secara harmoni dengan Perlembagaan Persekutuan sama ada secara tersurat atau tersirat; dan

(iv) Percanggahan tersebut tidak boleh diselesaikan melainkan dengan pembatalan salah satu dari peruntukan undang-undang atau Perlembagaan Persekutuan, dan berdasarkan kepada prinsip keunggulan Perlembagaan seperti terkandung dalam Per. 4(1) Perlembagaan, Perlembagaan Persekutuan hendaklah mengatasi peruntukan undang-undang bertulis yang lain.

[31] Dalam mentafsirkan sesuatu peruntukan undang-undang dalam konteks perlembagaan, mahkamah perlu menilai kepentingan awam diberikan keutamaan jika dibandingkan dengan kepentingan individu. Prinsip ini telah diputuskan dalam kes *Yong Moi Sin v. Kerajaan Malaysia & Anor* [1999] 8 CLJ 651; [2000] 1 MLJ 35. Kes itu melibatkan pengeledahan tanpa waran yang melibatkan satu kes rompakan. Hakim Abdul Malik Ishak H (sekarang HMR) dalam penghakimannya telah memutuskan seperti berikut:

> A search conducted by the police is an important aspect of the investigation process. A search is important as it will prevent the secretion of vital evidence. After the offending article is found, the seizure thereof would be useful as it would prevent the article from being destroyed ...
>
> The power to search must go hand in hand with the power to investigate (*State of Assam v. Upendra Nath Rajkhown* [1975] Cr LJ 354 (Gauhati)). The case of *Elias v. Pasmore* [1934] 2 KB 167 at p. 172 laid down a classic principle of law. The court there took the view that the interest of the State in the person charged being brought to trial in due course necessarily extends as well to the preservation of material evidence if his guilt or innocent as to his custody for the purpose of trial.
>
> ...
>
> Search by its very nature implies an act contrary to the will of the person whose premises is being searched. Section 62 of the CPC whittles down the right of an individual to prevent his premises from being searched. The legitimacy of the search without a warrant on the premises of the appellant by the second respondent can never be doubted. There was certainly a need to obtain, secure and preserve the evidence of a crime. Justice demands that the sanctity of a person's property be balanced with the need to maintain law and order. A high premium must be placed on the right of a police officer to conduct a search of one's premises in order to preserve evidence of a crime. Once a crime is perpetrated, search and seizure would be the most expedient

A form of investigation provided the information that is obtained gives rise to a reasonable cause for suspecting that any stolen property is concealed or lodged in any place.

[32] Dalam kes *Datuk Haji Harun Haji Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155, Mahkamah Persekutuan telah menggariskan B prinsip pentafsiran sebenar kepada Per. 8 Perlembagaan Persekutuan. Prinsip-prinsip itu digariskan oleh Suffian LP di ms. 165, adalah seperti berikut:

Doing the best we can, we are of the opinion that the principles C relevant to this appeal that may be deduced from the Indian decisions and from consideration of our constitution are these:

1. The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.

D

2. The equality provision is qualified. Specifically, discrimination is permitted within clause (5) of Article 8 and within Article 153.

3. The prohibition of unequal treatment applies not only to the E legislature but also to the executive - this is seen from the use of the words "public authority" in clause (4) and "practice" in clause (5)(b) of Article 8.

4. The prohibition applies to both substantive and procedural law.

F

5. Article 8 itself envisages that there may be lawful discrimination based on classification - thus Muslims as opposed to non-Muslims (para. (b) of clause (5) of Article 8); aborigines as opposed to others (para. (c)); residents in a particular State G as opposed to residents elsewhere (para. (d)); and Malays and natives of Borneo as opposed to others who are not (Article 153).

6. In India the first question they asked is, is there classification? If there is and subject to other conditions, they uphold the H law. If there is no classification, they strike it down.

With respect we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be - if the law is not discriminatory, if for instance it obviously I applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal

treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask further question, is it allowed? If it is, the law is good, and if it is not, the law is void. A

7. In India discriminatory law is good law if it is based on "reasonable" or "permissible" classification, using the words used in the passage reproduced above from the judgment in *Sri Ram Krishna Dalmia*, provided that: B

(i) the classification is founded on an intelligible *differentia* which distinguishes persons that are grouped together from others left out of the group; and C

(ii) the *differentia* has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question. D

... if the Indian doctrine of classification ... may be accepted by our courts, subject to the modification that the courts should not take it upon itself to consider whether the classification is reasonable or not, a task which should be left to the legislature ... the doctrine of classification should be accepted by our courts, subject to what we said in paragraph 6 above. We adhere to what was said in *PP v. Khong Teng Khen* at page 170: E F

> The principle underlying Article 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstances, nor that it "must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation', *Kedar Nath v. State of West Bengal* (AIR 1953 SC 404, 406). G

[33] Adalah menjadi tanggungjawab ke atas pemohon untuk menunjukkan atau demonstrate bagaimanakah hak-haknya telah dicabuli oleh s. 6(1)(b) dan s. 6(2)(a) APF dan menunjukkan bahawa hak-hak yang telah didiskriminasikan itu berada di bawah Per. 8 Perlembagaan Persekutuan. Kegagalan pemohon untuk berbuat demikian akan menemui titik noktah terhadap permohonan pemohon. Setelah ini dapat dibuktikan, beban pihak kerajaan untuk H I

menunjukkan bahawa pembatasan yang dikenakan adalah munasabah dan berkadaran dengan tujuan dan matlamat yang ingin dicapai oleh undang-undang itu.

[34] Dalam kes terbaru, *Said Mir Bahrami v. Pengarah Penjara Sungai Buloh, Selangor* [2013] 5 CLJ 447; [2013] 2 MLJ 478, Mahkamah Persekutuan telah membuat keputusan yang mencerminkan kedudukan terkini mengenai prinsip kekadaran (proportionality) dan kewajaran (reasonableness) dalam menentukan keabsahan sesuatu peruntukan undang-undang. YAA hakim Raus Sharif PMR telah memutuskan seperti berikut:

> [19] Section 20 of the Extradition Act may not have the usual safeguard as that of a trial, and it may appear to be harsh or 'draconian' as described by the learned counsel for the appellant, but it is a question of policy which had been debated and decided in Parliament. Speaking of 'harsh or unjust law' we can do no better than to quote what was said by Raja Azlan Shah (as His Majesty then was) in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187:
>
> > The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided in Parliament, and therefore not for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such of worthwhile course as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositore* [1913] AC 107, 118. Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. I apprehend, as unwise to as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a convert censure on the Legislature ... Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious appearance of fundamental rights, normally must address themselves to the legislature, and not the court. They have their remedy at the ballot box.

[35] Sekarang diperturunkan peruntukan di bawah s. 6 APF yang dibantah oleh pemohon sepenuhnya untuk kesenangan rujukan:

> 6. (1) No person shall:
>
> (a) have in his possession or in his custody or under his control; or
>
> (b) circulate, exhibit, distribute, display, manufacture, produce, sell or hire,
>
> any film or film-publicity material which has not been approved by the Board.
>
> (2) Any person who contravenes subsection (1) commits an offence and shall be liable on conviction:
>
> (a) in respect of any film, to a fine of not less than five thousand ringgit and not more than thirty thousand ringgit or to imprisonment for a term not exceeding three years or to both; or
>
> (b) in respect of any film-publicity material, to a fine of not less than one thousand ringgit and not more than ten thousand ringgit.
>
> (3) This section shall not apply to any film or film-publicity material in respect of which a certificate of exemption has been issued under sub-s. 8(3) so long as any conditions subject to which the certificate is issued are complied with.

[36] Jelas daripada peruntukan di atas bahawa adalah menjadi satu kesalahan sekiranya seseorang itu memiliki, mengedar atau menayangkan sebarang filem yang belum diluluskan oleh LPF. LPF telah ditubuhkan di bawah s. 4 APF. Seksyen 9 APF pula memperuntukan mengenai prosedur untuk mendapatkan kelulusan LPF sebelum sesebuah filem boleh diedar dan ditayangkan. Seksyen 10 mengenai keputusan LPF iaitu sama ada meluluskan filem itu atau meluluskan dengan pindaan/pemotongan atau menolak terus permohonan untuk kelulusan. Pemohon boleh merayu kepada jawatankuasa rayuan (di bawah s. 21) jika terkilan dengan keputusan LPF atau terus mendapatkan pengecualian daripada Menteri di bawah s. 25 APF. Pemohon juga boleh mendapatkan permit di bawah s. 8 sekiranya sesuatu filem itu untuk tayangan peribadi.

[37] Tujuan peruntukan-peruntukan tersebut diadakan telah diperjelaskan dalam Parlimen oleh Menteri berkenaan semasa pembentangan rang undang-undang APF tersebut. Merujuk kepada Hansard, antara lain ucapan YB Menteri berkenaan dalam Parlimen adalah seperti berikut:

> Kerajaan amat memandang serius kewujudan filem-filem lucah atau pun filem-filem haram kerana ianya bertentangan dengan nilai-nilai etika, budaya, moral dan agama masyarakat Malaysia yang berbilang kaum.
>
> Kesan daripada pengedaran dan penjualan filem lucah dan haram ini bukan sahaja boleh merosakkan akhlak dan moral masyarakat, malah turut menjejaskan usaha ke arah mewujudkan masyarakat harmonis yang berpegang teguh kepada nilai agama, moral yang tinggi. Kita merasa amat bimbang dengan gejala negatif kesan daripada menonton bahan-bahan lucah dan bahan-bahan haram ini. Peningkatan filem lucah dan haram di pasaran boleh mempengaruhi masyarakat terutama golongan muda mudi. Kes-kes seperti jenayah rogol, seks bebas, black metal, rose metal, red metal, dengan izinnya sumbang muhrim dan sebagainya didapati amat dipengaruhi oleh unsur-unsur negatif daripada filem.
>
> Bagi memastikan aspek-aspek negatif dalam sesuatu filem tidak ditayang atau diedarkan, kerajaan telah menubuhkan Lembaga Penapisan Filem di bawah Seksyen 3 Akta sedia ada dan ditadbirkan di bawah Kementerian Dalam Negeri. Sepanjang tahun 2000 sebanyak 30,020 telah ditapis. Daripada jumlah tersebut sebanyak 15,735 dilulus bersih, 10,606 lulus dengan potongan, 1,913 haram dan 1,766 ditolak. Pada tahun 2001 sehingga bulan Ogos, sebanyak 23,867 filem telah pun ditapis. Daripada jumlah tersebut sebanyak 16,739 dilulus bersih, 5,982 lulus dengan potongan, 576 diharam dan 570 ditolak.
>
> Aktiviti pengedaran filem yang melanggar undang-undang seperti filem VCD, DVD yang lucah dan tidak ditapis didapati begitu berleluasa. Oleh itu, kerajaan melihat aktiviti penguatkuasaan adalah amat penting bagi memastikan undang-undang yang digubal dipatuhi. Keupayaan Unit Penguatkuasa Kementerian Dalam Negeri sentiasa ditingkatkan agar dapat menjalankan operasi di seluruh negara bagi menjalankan tugas-tugas penguatkuasaan.
>
> Dari segi penguatkuasaan pada tahun 2000, sebanyak 641 buah premis telah diperiksa. Daripada pemeriksaan tersebut, sebanyak 721,857 keping filem dalam pelbagai bentuk telah pun dirampas

di bawah kesalahan-kesalahan seperti lucah dan tidak mempunyai Sijil Penapisan iaitu Sijil A dan Sijil Salinan iaitu Sijil B dengan bilangan kes ke Mahkamah sebanyak 611 kes. Bagi tahun 2001 pula sehingga bulan September sebanyak 1,846 buah premis telah pun diperiksa. Dari pemeriksaan tersebut 1,411,690 keping filem lucah dan tidak mempunyai sijil dalam pelbagai bentuk telah pun dirampas dengan bilangan kes ke Mahkamah sebanyak 2,747 kes.

Tuan Yang di-Pertua, dengan penggubalan rang undang-undang yang baru ini adalah diharapkan agar kawalan dan penguatkuasaan undang-undang ke atas aktiviti-aktiviti pemilikan, pengedaran, penayangan, pempameran dan membuat salinan sama ada filem lucah atau filem yang belum lulus oleh Lembaga Penapisan Filem akan dapat diambil tindakan dengan lebih berkesan lagi.

Tuan Yang di-Pertua, menyedari hakikat bahawa filem merupakan suatu bentuk media moden yang boleh memberi impak ketara ke atas sikap, perilaku, kepercayaan dan gaya hidup rakyat, menjadilah tanggungjawab kerajaan memastikan tata nilai dan budaya masyarakat Malaysia tidak terhakis akibat dari unsur-unsur yang tidak sesuai dalam sesuatu filem.

[38] Mengenai filem-filem dokumentari dari luar negara dan filem-filem untuk kegunaan peribadi, YB Menteri turut menyatakan:

Mengenai isu filem dokumentari yang ditaja oleh kerajaan yang boleh juga membahayakan dan filem-filem kepunyaan peribadi yang tidak ditapis, sebenarnya untuk makluman dewan yang mulia ini khususnya Datuk Mansor, kalau seseorang mempunyai sesebuah filem, walaupun akan disimpan sendiri dan kalau hendak tengok pun, dia tengok sendiri kira-kiranya ini filem peribadilah. Tetapi ini tidak bermaksud bahawa filem-filem yang disimpan oleh seseorang untuk kegunaan peribadi boleh mengandungi kandungan lucah dan haram tidak boleh, jika kita membeli sesebuah filem dari sesebuah negara, bawa masuk ke negara ini, kalau ianya haram atau tidak ditapis, tidak boleh juga. Ini memang di sisi undang-undang tidak boleh juga, salah juga kecuali kita bawa keluarga katakanlah melancong ke negara Jepun, lepas itu dalam perjalanan melancong kita ambil video cam, itu pun membuat filem juga tetapi bahan-bahan seumpama ini dibenarkan untuk kegunaan sendiri tanpa tapisan sebab ini tidak menyalahi apa jua undang-undang yang sedia ada atau pun mana-mana seksyen yang terkandung dalam Rang Undang-undang Penapisan Filem itu.

[39] Mengenai kemungkinan kuasa sewenang-wenang dijalankan oleh LPF dalam menjalankan tugas yang menjadi kegusaran pemohon, YB Menteri menyatakan seperti berikut:

A Walau bagaimanapun, kita mempunyai garis panduan. Garis panduan ini begitu tebal. Tengok [Menunjukkan buku Manual Lembaga Penapisan Filem], dalam ini. Semua ahli Lembaga Penapisan Filem akan sentiasa merujuk kepada Manual Lembaga Penapisan Filem ini yang mengandungi apakah unsur-unsur kelucahan, apakah unsur-unsur keganasan dan semua penerbit-penerbit filem atau pun producers di negara kita, mereka ini juga kena tahu sebab kalau mereka membuat filem, nanti ditapis, potong kiri, kanan, tidak dapat jual, mereka rugi. Ini bermaksud mereka ini harus bersiap sedia dengan pengetahuan-pengetahuan yang terkandung dalam buku ini.

[40] Peguambela terpelajar antara lain turut berhujah bahawa filem "No Fire Zone: The Killing Fields of Sri Lanka" tidak mengandungi bahan lucah dan mengancam keselamatan negara, ketenteraman awam dan moral. Peruntukan APF yang membuat pembatasan secara blanket turut melibatkan filem-filem dokumentari dan juga kartun dikatakan sebagai tidak munasabah dan tidak berkadaran. Persoalannya bagaimanakah kita mengetahui apa kandungan atau cerita sebenar dalam sesebuah filem tersebut sekiranya filem itu tidak diuji tayang oleh sebuah badan bebas seperti LPF yang ditubuhkan di bawah APF? Sedangkan filem dokumentari dan filem kartun sekarang ini pun tidak bebas daripada unsur-unsur negatif dan lucah. Oleh itu prosedur yang diperuntukan di bawah s. 6(1)(b) APF adalah munasabah dan berkadaran dengan tujuan dan matlamat APF itu diwujudkan. Mahkamah ini berpandangan bahawa pembatasan yang diadakan adalah wajar bagi mencapai maksud asal APF itu digubal.

[41] Sekiranya "blanket approval" diberikan kepada setiap filem hanya berpandukan kepada tajuk filem itu atau berdasarkan kepada pengataan oleh pengeluar atau pemilik filem itu adalah tidak memadai. Sekiranya ini dibenarkan maka matlamat dan maksud asal APF digubal pastinya tidak akan tercapai. Hak individu adalah tertakluk kepada hak masyarakat umum. Seksyen 6(1)(b) APF bukan merupakan satu peruntukan bagi mengharamkan semua jenis filem tetapi lebih merupakan prosedur yang wajar dipatuhi dan diikuti sebelum sesebuah filem boleh diedar dan ditayangkan. Filem-filem tersebut wajar ditapis terlebih dahulu sebelum boleh ditayangkan kepada umum dan ini adalah bertujuan untuk menjaga kepentingan awam demi keselamatan negara, hubungan antarabangsa, ketenteraman awam atau moral masyarakat awam.

[42] Mahkamah ini berpandangan bahawa ss. 6(1)(b) dan 6(2)(a) APF adalah pembatasan terhadap hak keistimewaan untuk bersuara dan berekspresi yang munasabah dan berkadaran dengan tujuan dan matlamat yang ingin dicapai oleh APF. Pembatasan tersebut tidak bercanggah atau *ultra vires* di bawah Fasal 10(2)(a) Perlembagaan Persekutuan. Oleh yang demikian peruntukan-peruntukan tersebut tidak wajar dibatalkan di bawah Fasal 4(1) Perlembagaan Persekutuan.

[43] Atas alasan-alasan tersebut, mahkamah ini menolak permohonan pemohon di dalam notis permohonan beliau. Pertuduhan terhadap pemohon di Mahkamah Majistret dalam kes no: 83-005-09-2013 hendaklah diteruskan perbicaraan sehingga diselesaikan.